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NO. 79-1749

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRIES OF THE UNITED STATES AND CANADA, LOCAL NO. 68,
Petitioner

v.

BEXAR PLUMBING COMPANY, INC.,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I.

STATEMENT OF THE CASE

The Statement of the Case presented by the Petitioner, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industries of the United States and Canada, Local No. 68 (hereinafter referred

to as the "Union"), although benignly stated, is satisfactory to apprise the Court of the general issues of law involved.

However, an analysis of the award of damages made by the District Court in this case will serve to eliminate some of the confusion generated by the Union's petition in that regard. As noted by the Petitioner, Bexar Plumbing Company, Inc. (hereinafter referred to as the "Company" or "Bexar") filed the present lawsuit grounded upon §§ 301(a) and 303(b) of the Labor Management Relations Act, 29 U.S.C. § 185(a) and 29 U.S.C. § 187(b) respectively, to recover damages sustained by it as a result of the Union's breach of contract and campaign of illegal picketing in 1973 and 1974. The court awarded a total sum of $26,899.35 to the Company as damages sustained as a result of the Union's unlawful picketing. Of the total, $923.66 was allocated to business losses, $949.69 to out-of-pocket expenses, and $25,026.00 to attorneys' fees, all of which were deemed compensatory damages due the Company. The compensatory award for attorneys' fees encompassed only that sum which Bexar had already expended to obtain a cease and desist order against the Union's activities in order to effectuate a resumption of work on the job sites. The Court declined to award attorneys' fees to the Company as a prevailing litigant to reimburse it for the expenses incurred in bringing the present damage action in federal court. It is the former award of attorneys' fees, expended by the Company in previous legal proceedings to curb the Union's damaging course of conduct, which the Fifth Circuit affirmed as a proper element of compensatory damages due the Company in the instant case.

II.

SUMMARY OF THE ARGUMENT

The Fifth Circuit's decision below, upholding the award of attorneys' fees to Bexar as part of the compensatory damages to which the Company was entitled as a result of the Union's illegal picketing, presents none of the considerations traditionally deemed to warrant review by this Court. The holding does not conflict with this Court's decision in *Alyeska,* as the instant dispute deals with the inclusion of attorneys' fees as part of the primary relief recoverable in § 301 and § 303 actions, rather than the secondary adjustment of litigation expenses to a prevailing party. Similarly, the decision is consonant with the overwhelming weight of authority among the other circuits which acknowledges the propriety of the inclusion of attorneys' fees as an element of damages in § 301 and § 303 cases. Just as the Fifth Circuit did in the instant case, the other courts have grounded their decisions upon the premise that attorneys' fees expended in legal proceedings play a decisive role in terminating illegal secondary activity and work stoppages, thereby preventing the accrual of sizeable amounts of business losses and related expenses in their stead. Hence, there is no compelling reason for this Court to grant the Union's petition, thereby disturbing a decision founded upon sound logic and an abundance of judicial authority.

III.

ARGUMENT AND AUTHORITIES

A. The Alyeska Decision Is Not Controlling

In its petition to the Court, the Union has once again refused to recognize the distinction between the inclusion

of attorneys' fees as part of compensatory damages due a plaintiff and the post trial award of attorneys' fees expended in the prosecution of the case to a successful litigant. The decision of the Court in *Alyeska Pipeline Service Company v. The Wilderness Society,* 421 U.S. 240 (1975), manifestly deals only with the latter in rejecting the "private attorney general" approach and restating the "American Rule" that, absent statute or enforceable contract, a prevailing litigant is not entitled to an award of attorneys' fees. *Id.* at 258. Indeed, in the dissenting opinion, Mr. Justice Marshall distinguishes between the two concepts in commenting upon a prior decision:

> . . . the attorneys' fee award was legitimately included as a part of the primary relief to which the plaintiff was entitled, rather than an ancillary adjustment of litigation expenses.

Id. at 281.

Stated simply, the *Alyeska* decision is plainly inapposite to the instant controversy, as attorneys' fees for the trial and appeal of this case were not awarded to Bexar. In the decision below, the Fifth Circuit ably dealt with these issues by explaining that the attorneys' fees awarded to Bexar for damages resulting from the Union's illegal activities were purely compensatory in nature. (Petitioner's Appendix C, p. 31). The court expressly declined to award attorneys' fees to the Company for the prosecution of the present action. (Petitioner's Appendix C, p. 32). As aptly stated by the Fifth Circuit, when faced with identical arguments by the Union founded upon the *Alyeska* decision:

> The Union contends that *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975), precludes the award of attorneys' fees. In *Alyeska* the Court discussed the "American Rule" that attorneys' fees are not ordinarily recoverable by the prevailing litigant in federal litigation absent statutory authorization. 421 U.S. at 257-62. *The Union, relying on Alyeska in the present case, ignores the settled rule that under section 303 attorneys' fees, "in themselves, are not recoverable. They are only recoverable as an element of the damages inflicted by the illegal secondary activity." Sheet Metal Workers, supra.* 384 F.2d at 110 n. 10. (emphasis supplied).

(Petitioner's Appendix C, p. 31). This well-established distinction in § 303 actions has been acknowledged by numerous other courts, where attorneys' fees have been included as an element of the primary recovery awarded plaintiff, but denied to the prevailing litigant for the prosecution of the lawsuit. *Sheet Metel Workers Ass'n., Local 223 v. Atlas Sheet Metal Co.,* 384 F.2d 101 (5th Cir. 1967); *Capeletti Brothers, Inc. v. Local No. 487 Int'l. Union of Operating Engineers,* 514 F.2d 1239 (5th Cir. 1975); *Noranda Aluminum, Inc. v. United Brotherhood of Carpenters,* 528 F.2d 1304 (8th Cir. 1976); *Sillman v. Teamsters Union Local 386,* 535 F.2d 1172 (9th Cir. 1976).

It has long been recognized that attorneys' fees are properly recoverable as an element of compensatory damages in both § 301 and § 303 actions, a rule equally viable both before and after *Alyeska. General Drivers and Helpers Union, Local No. 554 v. Young and Hay Transportation Co.,* 522 F.2d 562 (8th Cir. 1975); *United Steelworkers of America v. Butler Manufacturing*

Co., 439 F.2d 1110 (8th Cir. 1971); *Sheet Metal Workers Ass'n., Local 223 v. Atlas Sheet Metal Co., supra; Teamsters Local Union No. 984 v. HumKo Co.*, 287 F.2d 231 (6th Cir. 1961), *cert. denied*, 366 U.S. 962 (1961); *H.L. Robertson & Associates, Inc. v. Plumbers Local Union No. 519*, 429 F.2d 520 (5th Cir. 1970); *Mason-Rust v. Laborers' Int'l Union, Local 42*, 435 F.2d 939 (8th Cir. 1970); *Linbeck Construction Corp. v. Int'l Ass'n. of Bridge Workers*, 547 F.2d 948 (5th Cir. 1977), *cert. denied*, 434 U.S. 955 (1977); *Eazor Express, Inc. v. Int'l Brotherhood of Teamsters*, 520 F.2d 951 (3rd Cir. 1975), *cert. denied*, 424 U.S. 935 (1976), *rehearing denied*, 425 U.S. 908 (1976); *Vassar Construction, Inc. v. Teamster Local Union No. 445*, 436 F. Supp. 1084 (S.D.N.Y. 1977); *Texas Distributors, Inc. v. Local Union No. 100, United Ass'n. of Plumbers & Pipefitters*, 598 F.2d 393 (5th Cir. 1979); *Associated General Contractors v. Construction and General Laborers Local No. 563*, 102 LRRM 2974 (8th Cir. 1979). Indeed, no court has explicitly held that the *Alyeska* holding prohibits the inclusion of attorneys' fees in such an award of compensatory damages. The courts that have considered the tenets of *Alyeska* have generally held them to be inapplicable in determining the damage award due litigants in § 301 and § 303 cases. As summarized by the Eighth Circuit in *Associated General Contractors v. Construction and General Laborers Local No. 563, supra*, at 2975-76:

> *Alyeska* did not involve labor law and did not discuss § 303. The case involved only the propriety of the "private attorney general" exception there in issue. The attorneys' fee demand here is predicated on the recovery of compensatory damages from an earlier, terminated violation, as provided by § 303 (b), not on a theory of recovery for attorneys' fees incurred in a suit brought as a "private attorney general" or otherwise. We cannot agree that *Alyeska*, a Supreme Court opinion in a case so different on its facts, can of itself warrant summary judgment and dismissal of a complaint seeking attorneys' fees under § 303(b) as damages incurred in effecting resumption of work. *Zenith Radio Corp. v. United States*, 437 U.S. 443, 462 (1978).

See also Scott v. Local Union 377, Int'l Brotherhood of Teamsters, 548 F.2d 1244 (6th Cir. 1977), *cert. denied*, 431 U.S. 968 (1977); *Int'l Union, United Auto Workers v. Cardwell Mfg. Co.*, 416 F. Supp. 1267 (D. Kan. 1976). In essence, the Union's petition seeks to persuade this Court to move far beyond the scope of *Alyeska*, to repudiate the decisions of an array of lower courts spanning several decades, and thus to hold that attorneys' fees may never constitute part of the compensatory damages due a litigant in § 301 or § 303 actions.

B. No Significant Conflict Among The Circuits

Moreover, the Union beckons this Court to discuss an issue about which there is no significant conflict among the circuits. Plainly, under the *Alyeska* case, attorneys' fees expended in the course of the legal proceeding are not recoverable. Conversely, the cases are well aligned, as reflected by the myriad of cases cited above, that if attorneys' fees are expended in stopping illegal picketing or effecting a resumption of work stemming from a §8(b)(4) violation or an illegal work stoppage, they are compensatory damages and are properly awardable. An analysis of the work stoppage situation underscores the sagacity of this rule. If a company allows a work stop-

page to continue, it will generally suffer heavy business losses which are indisputably recoverable in a subsequent proceeding. However, if the Company takes prompt legal action to put an end to the work stoppage, actual business losses will be correspondingly diminished. Hence, the courts have avoided placing the company in the position of making a Hobson's choice between paying expensive legal fees without recompense or suffering financial ruin as a result of a union's illegal conduct. As the Eight Circuit observed in *Associated General Contractors v. Construction and General Laborers' Union No. 563, supra* at 2976:

> Reasonable attorneys' fees incurred in effectuating resumption of work in effect take the place of other compensable damages which would continue to be suffered if work were not resumed. Aimed at mitigating the losses resulting from a work stoppage, and at preserving the enterprise, they are analogous to costs of subcontracting and overtime. They are within the purview of § 303(b) as other courts have held.

IV.

CONCLUSION AND PRAYER

The Union's petition fails to demonstrate that the Fifth Circuit's affirmance of the District Court's award of attorneys' fees to the Company as part of the compensatory damages due it as a result of the Union's illegal activities is repugnant either to this Court's decision in *Alyeska* or to the great weight of authority in the other circuits. The Union does not advance one viable reason to dispense with the easily understood and common sense distinction between attorneys' fees awarded as compensatory damages and those given to a victorious litigant. This appears to be no occasion to burden this Court with reviewing a long line of harmonious decisions from a variety of courts or disturbing the well-reasoned opinion of the Fifth Circuit below.

WHEREFORE, PREMISES CONSIDERED, Bexar Plumbing Company prays that the Union's Petition for Certiorari be in all things denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari has been served upon Petitioner, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industries of the United States and Canada, Local No. 68 by placing a copy thereof in the United States Mail, postage prepaid, certified, return receipt requested, addressed to its attorney of record, Marvin B. Peterson, 1220 Americana Building, 811 Dallas Avenue, Houston, Texas 77002, on this the _____ day of May, 1980.

CLINTON S. MORSE